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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

FENWICK & WEST LLP
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14 KYLAND YOUNG, individually and on
 behalf of all others similarly situated,

15 Plaintiff,

16 v.

17 NEOCORTEXT, INC.,

18 Defendant.

Case No.: 2:23-cv-02496-WLH(PVCx)

**DEFENDANT NEOCORTEXT,
 INC.’S NOTICE OF MOTION AND
 SPECIAL MOTION TO STRIKE
 PLAINTIFF’S CLAIM PURSUANT
 TO CAL. CIV. PROC. CODE
 § 425.16**

Date: July 14, 2023
 Time: 1:30 p.m.
 Dept: Courtroom 9B
 Judge: Hon. Wesley L. Hsu
 Trial Date: None

NOTICE OF MOTION AND MOTION TO STRIKE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 14, 2023, at 1:30 p.m., or as soon thereafter as counsel may be heard, in Courtroom 9B of the above-entitled Court, located at 350 W. 1st Street, Los Angeles, CA 90012, Defendant NeoCortext, Inc., will, and hereby does, move this Court to strike Plaintiff Kyland Young’s right of publicity claim pursuant to Cal. Civ. Proc. Code § 425.16, and award NeoCortext its fees and costs under Cal. Civ. Proc. Code § 425.16(c) on the grounds that:

(1) Plaintiff’s claim arises from protected activity; and

(2) Plaintiff cannot demonstrate a probability of prevailing on his right of publicity claim.

Defendant’s Motion is made on this Notice, the accompanying Memorandum of Points and Authorities, all pleadings and papers that are of record in this case, and on such other and further evidence as may be offered at the hearing.

This Notice of Motion is made following the conference of counsel for Defendants and Plaintiff under L.R. 7-3, which took place on May 24, 2023, where the parties thoroughly discussed the substance and potential resolution of the filed motion by videoconference. The parties were unable to reach a resolution, and Plaintiff opposes the Motion.

Dated: May 31, 2023

FENWICK & WEST LLP

By: /s/ Tyler G. Newby
Tyler G. Newby

Attorneys for Defendant
NEOCORTEXT, INC.

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION..... 1

II. BACKGROUND AND FACTS ALLEGED..... 3

III. LEGAL STANDARD..... 4

IV. ARGUMENT 5

 A. Plaintiff’s Claim Arises from Protected Activity. 5

 1. The display of images of celebrities and other public figures in Reface are statements made in a public forum in connection with issues of public interest..... 5

 a. Plaintiff’s claim arises from conduct in a public forum. 5

 b. Plaintiff’s claim concerns an issue of public interest. 6

 2. Reface involves rights of free speech in connection with a public issue or an issue of public interest..... 7

 B. Plaintiff Cannot Demonstrate a Probability of Prevailing on His Right of Publicity Claim. 8

 1. The Copyright Act Preempts Plaintiff’s Claim. 8

 a. The subject matter of Plaintiff’s right of publicity claim falls within the subject matter of copyright..... 9

 b. Plaintiff asserts rights that are equivalent to rights within the general scope of copyright. 10

 2. Plaintiff’s Right of Publicity Claim is Also Barred by the First Amendment. 14

 3. Plaintiff Fails to Plead a Prima Facie Violation of His Right of Publicity..... 16

V. CONCLUSION 17

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TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Barrett v. Rosenthal</i> , 40 Cal. 4th 33 (2006).....	5
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007)	16
<i>CBS Broad. Inc. v. Am. Broad. Cos., et al.</i> , C.D. Cal. Case No. 12-CV-04073-GAF-JEMx.....	9
<i>City of Colton v. Singletary</i> , 206 Cal. App. 4th 751 (2012).....	4
<i>CoreCivic, Inc. v. Candide Grp., LLC</i> , 46 F.4th 1136 (9th Cir. 2022).....	1
<i>Creative Photographers, Inc. v. Brook Collection, LLC</i> , No. 2:20-cv-09261-RGK-E, 2021 WL 3568243 (C.D. Cal July 7, 2021).....	14
<i>Downing v. Abercrombie & Fitch</i> , 265 F.3d 994 (9th Cir. 2001).....	12, 13
<i>Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc.</i> , 742 F.3d 414 (9th Cir. 2014).....	5
<i>Hilton v. Hallmark Cards</i> , 599 F.3d 894 (9th Cir. 2009).....	6
<i>Hupp v. Freedom Commc 'ns, Inc.</i> , 221 Cal. App. 4th 398 (2013).....	5
<i>Jackson v. Mayweather</i> , 10 Cal. App. 5th 1240 (2017).....	5
<i>Kirby v. Sega of Am., Inc.</i> , 144 Cal. App. 4th 47 (2006).....	14, 15
<i>Laws v. Sony Music Ent., Inc.</i> , 448 F.3d 1134 (9th Cir. 2006).....	10, 11
<i>Maloney v. T3Media, Inc.</i> , 853 F.3d 1004 (9th Cir. 2017).....	<i>passim</i>
<i>Maloney v. T3Media, Inc.</i> , 94 F. Supp. 3d 1128 (C.D. Cal. 2015).....	6
<i>Metabolife Int'l, Inc. v. Wornick</i> , 264 F.3d 832 (9th Cir. 2001).....	4
<i>Mindys Cosms., Inc. v. Dakar</i> , 611 F.3d 590 (9th Cir. 2010).....	4

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1 *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress,*
890 F.3d 828 (9th Cir. 2018) 4, 8

2

3 *Playboy Enters., Inc. v. Terri Welles, Inc.,*
78 F.Supp.2d 1066 (S.D. Cal. 1999) 14

4 *Seeling v. Infinity Broad. Corp.,*
97 Cal. App. 4th 798 (2002) 7

5

6 *Stewart v. Rolling Stone LLC,*
181 Cal. App. 4th 664 (2010) 6

7 *Tamkin v. CBS Broad., Inc.,*
193 Cal. App. 4th 133 (2011) 7

8

9 *Van Buskirk v. Cable News Network, Inc.,*
284 F.2d 977 (9th Cir. 2002) 9

10 *Varian Med. Sys., Inc. v. Delfino,*
35 Cal. 4th 180 (2005) 4

11

12 *White v. City of Sparks,*
500 F.3d 953 (9th Cir. 2007) 7, 15

13 *Winter v. DC Comics,*
30 Cal. 4th 881 (2003) 14, 15, 16

14

15 **STATUTES AND RULES**

16 17 U.S.C. § 102 1, 9

17 17 U.S.C. § 103 8

18 17 U.S.C. § 106 1, 8, 10

19 17 U.S.C. § 301 2, 8

20 Cal. Civ. Code § 3344 3, 11, 16

21 Cal. Civ. Proc. Code § 425.16 *passim*

22 Copyright Act *passim*

23 Federal Rules of Civil Procedure 12(b)(6) 4, 9

24 Federal Rules of Evidence 201(b) 9, 10

25

26

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1 **I. INTRODUCTION**

2 Plaintiff's lawsuit is a strategic lawsuit against public participation ("SLAPP")
 3 aimed not at protecting his ability to sell his image and likeness, but at gagging a
 4 novel application that enables users to engage in creative activities that are protected
 5 by the First Amendment. Defendant NeoCortext's Reface app allows end users to
 6 create new content by replacing a face in a photo or short video clip with a different
 7 face, such as their own. The source photos and video clips may involve clips or stills
 8 from movies or, as in the case of Plaintiff, television shows. Using artificial
 9 intelligence, Reface lets users transform these images to create humorous and
 10 sometimes absurd new works for personal use. Complaint ("Compl.") ¶¶ 2, 4, 19,
 11 21. This is exactly the type of creative activity that the First Amendment protects
 12 and that the right of publicity does not.

13 California's anti-SLAPP statute is a special procedural vehicle to dispose of
 14 meritless lawsuits like this one that burden a defendant's First Amendment rights.
 15 Cal. Civ. Proc. Code § 425.16; *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136,
 16 1143 (9th Cir. 2022). Plaintiff's sole claim, brought under California's statutory right
 17 of publicity, arises from "protected activity" as defined under the anti-SLAPP statute.
 18 Defendant's offering of an entertainment application that allows users to modify
 19 photos or video clips of public figures and create new content is conduct in a public
 20 forum both on matters of public interest and in furtherance of Defendant's and its
 21 users' free speech rights. Cal. Civ. Proc. Code §§ 425.16(e)(3), (e)(4). Additionally,
 22 Plaintiff cannot show a probability of prevailing on his claim as a matter of law.
 23 Plaintiff's claim fails for at least three reasons, as laid out in NeoCortext's
 24 concurrently filed motion to dismiss.

25 *First*, Section 301 of the Copyright Act preempts Plaintiff's claim. Section
 26 301 bars any state-law claim that (1) "come[s] within the subject matter of copyright
 27 as specified by [17 U.S.C. § 102]" and (2) asserts rights "equivalent to any of the
 28 exclusive rights within the general scope of copyright as specified by [17 U.S.C. §

1 106].” 17 U.S.C. § 301(a). Plaintiff’s claim is plainly within the subject matter of
 2 copyright because Plaintiff alleges that his likeness has been captured in copyrighted
 3 photos and video stills. Compl. ¶¶ 2, 22. And Plaintiff’s right of publicity claim is
 4 equivalent to the rights “within the general scope of copyright” because the claim
 5 seeks to control the creation of derivative works from copyrighted photographs and
 6 video clips in which his image appears—a right granted exclusively to copyright
 7 holders. At bottom, Plaintiff brings a copyright infringement claim that he likely has
 8 no legal right to bring under the guise of a right of publicity claim.

9 *Second*, Plaintiff’s right of publicity claim is barred by the First Amendment
 10 under California’s transformative use test, which balances a celebrity’s right of
 11 publicity with First Amendment rights. Here, Plaintiff’s Complaint alleges that the
 12 Reface app provides users with the ability to create new images or videos that
 13 embody the user’s creativity and aesthetic expression. Compl. ¶¶ 2, 4, 19, 21. The
 14 Complaint also alleges that the new work includes distinctive features that are absent
 15 from the original photographs. *Id.* ¶¶ 1-2, 21. Because these add expressive content
 16 to the original photograph of Plaintiff, they are sufficiently transformative to be
 17 entitled to First Amendment protection.

18 *Third*, Plaintiff fails to plead a prima facie violation of his statutory right of
 19 publicity. California’s statutory right of publicity claim requires Plaintiff to allege
 20 that Defendant “knowingly use[d] [his] name, voice, signature, photograph, or
 21 likeness” for advertising purposes. The Complaint does not allege a knowing use of
 22 any such attribute. Nor does the Complaint sufficiently allege that NeoCortext’s
 23 conduct qualifies as advertising.

24 Accordingly, NeoCortext respectfully requests, pursuant to Cal. Civ. Proc.
 25 Code § 425.16, that the Court strike Plaintiff’s right of publicity claim and order
 26 Plaintiff to pay Defendant’s attorneys’ fees it incurred in bringing this motion.

1 **II. BACKGROUND AND FACTS ALLEGED**

2 Defendant is the developer of the Reface app, which users may download from
 3 the Google Play Store and the Apple App Store. Compl. ¶ 6. Defendant offers both
 4 a free version of Reface as wells as a paid version. *Id.* ¶ 14. Both versions allow
 5 users to access a catalogue of images and short video GIFs of various “actors,
 6 musicians, athletes, celebrities, and/or other well-known individuals, from third party
 7 sources, including “mybestgif.com, <https://tenor.com/>, Google Video, [or] Bing
 8 Video.” *Id.* ¶ 15. Reface users can create new visual works and digital content by
 9 uploading pictures and images from their smartphone and swapping faces in
 10 uploaded photos and GIFs in the catalogue. *Id.* ¶ 2. Users can share the images with
 11 others for their reactions to “freak out friends.” *Id.* ¶ 21. The newly created images
 12 have both creative and aesthetic value. *Id.* ¶¶ 4, 21. Aside from the expressive value
 13 and being able to “‘Become Anyone You Wished to Be’,” *id.* ¶ 3, the new images
 14 users create are also distinctive from the original photos. When Reface users create
 15 an image using the free version, the watermark “made with reface app” appears on
 16 the new image with the Reface logo. *Id.* ¶ 2.

17 On April 3, 2023, Plaintiff Kyland Young, a “cast member of several CBS
 18 shows” sued NeoCortext for violation of his statutory right of publicity under Cal.
 19 Civ. Code § 3344. *Id.* ¶ 5. Plaintiff alleges that the watermarks that appear on the
 20 images created with the free version, which he describes as “teasers” are commercial
 21 advertising which have the purpose of inducing users to sign up for the paid version
 22 to remove the watermarks. *Id.* at 1, ¶ 2. Plaintiff does not, and cannot, allege that
 23 the free version is a limited-time promotion; users may continue using the free
 24 version if they do not want the added features of the paid PRO version. Plaintiff also
 25 alleges that the watermarked face-swapped photos and GIFs “serve as free
 26 advertising to attract new downloads of the Reface app.” *Id.* at ¶ 21.

1 The thrust of Plaintiff’s Complaint is that Defendant’s social entertainment app
 2 allows users to use photos and videos of celebrities and other public figures to create
 3 new, creative works.

4 **III. LEGAL STANDARD**

5 In 1992, California enacted its anti-SLAPP statute to deter lawsuits that would
 6 “chill the valid exercise of the constitutional right [] of freedom of speech.” *Varian*
 7 *Med. Sys., Inc. v. Delfino*, 35 Cal. 4th 180, 192 (2005). The anti-SLAPP statute
 8 allows defendants to file a “special motion to strike” claims “aimed at chilling
 9 expression through costly, time-consuming litigation” in their infancy. Cal. Civ.
 10 Proc. Code § 425.16(b)(1); *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 839-840
 11 (9th Cir. 2001).

12 “A court considering a motion to strike under the anti-SLAPP statute must
 13 engage in a two-part inquiry.” *Mindys Cosms., Inc. v. Dakar*, 611 F.3d 590, 595 (9th
 14 Cir. 2010). First, the Court must determine whether the defendant has made “a prima
 15 facie showing that the plaintiff’s suit ‘arises from an act in furtherance of the
 16 defendant’s rights of petition or free speech.’” *Id.* (quoting *Vess v. Ciba–Geigy Corp.*
 17 *USA*, 317 F.3d 1097, 1110 (9th Cir. 2003)). Courts often frame the resulting legal
 18 inquiry as whether the claim would burden “protected activity.” *City of Colton v.*
 19 *Singletary*, 206 Cal. App. 4th 751, 766 (2012). If the defendant makes the required
 20 showing, the plaintiff must then “demonstrate a probability of prevailing on the
 21 challenged claims.” *Mindys Cosms.*, 611 F.3d at 595 (quoting *Vess*, 317 F.3d at 1110).
 22 Where the defendant brings an anti-SLAPP motion on the pleadings, as this motion
 23 does, the analysis of the second part is identical to the Rule 12(b)(6) standard of
 24 review. *Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d
 25 828, 832 (9th Cir. 2018).

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1 **IV. ARGUMENT**

2 **A. Plaintiff's Claim Arises from Protected Activity.**

3 Plaintiff's single claim is subject to an anti-SLAPP motion because the use of
 4 Plaintiff's image in Reface is "in furtherance of a person's right of petition or free
 5 speech under the United States or California Constitution in connection with a public
 6 issue." Cal. Civ. Proc. Code § 425.16(e). The statute enumerates four categories of
 7 protected activity: (i) written or oral statements in a legislative, judicial, or executive
 8 proceeding; (ii) written oral statements in connection with an issue under
 9 consideration or review by a legislative, executive, or judicial body; (iii) any written
 10 or oral statements made in a public forum in connection with an issue of public
 11 interest; and (iv) other conduct in furtherance of the exercise of the right of petition
 12 or free speech in connection with a public issue or an issue of public interest. Cal.
 13 Civ. Proc. Code § 425.16(e). Because the legislature declared that the statute "shall
 14 be construed broadly" (Cal. Civ. Proc. Code § 425.16(a)), courts "must generally
 15 presume the validity of the claimed constitutional right in the first step of the anti-
 16 SLAPP analysis." *Greater L.A. Agency on Deafness, Inc. v. Cable News Network,*
 17 *Inc.*, 742 F.3d 414, 422 (9th Cir. 2014).

18 **1. The display of images of celebrities and other public figures**
 19 **in Reface are statements made in a public forum in**
 20 **connection with issues of public interest.**

21 **a. Plaintiff's claim arises from conduct in a public forum.**

22 Websites and entertainment applications like Reface are "public forums for
 23 purposes of the anti-SLAPP statute." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4
 24 (2006); *see also Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 404 (2013)
 25 (same); *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1252 (2017), *as modified*
 26 (Apr. 19, 2017) (finding that postings on social media apps Facebook and Instagram
 27 were made in a public forum). Even websites or apps where the defendant publishes
 28 photographs and "controls the content of the [] website with no ability for members
 of the public to express their viewpoint" still qualify as a public forum because they

1 are part of the internet at-large. *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1134
 2 (C.D. Cal. 2015), *aff'd*, 853 F.3d 1004, 1009 n.3 (9th Cir. 2017) (analyzing
 3 California’s anti-SLAPP statute and explaining that “claims [that] stem from the
 4 publication and distribution of expressive photographs over the Internet” fall under
 5 both Cal. Civ. Proc. Code sections 425.16(e)(3) and (e)(4)).

6 Because Reface allows users to select, modify, and distribute photos and GIFs,
 7 it is a “public forum.”

8 **b. Plaintiff’s claim concerns an issue of public interest.**

9 Plaintiff’s claim arises out of the Reface users’ ability to modify images of
 10 celebrities and public figures, including for entertainment and parody purposes,
 11 which are issues of public interest. While California’s anti-SLAPP statute does not
 12 define “issue of public interest,” courts have given way to the statute’s explicit
 13 command that it “shall be construed broadly” and have found that “an issue of public
 14 interest” means an issue: “(1) [] ‘concerning a person or entity in the public eye’; (2)
 15 ‘conduct that could directly affect a large number of people beyond the direct
 16 participants’; or (3) ‘a topic of widespread, public interest.’” *Hilton v. Hallmark*
 17 *Cards*, 599 F.3d 894, 906 (9th Cir. 2009) (*citing Rivero v. Am. Fed’n of State, Cnty.,*
 18 *& Mun. Emps.*, 105 Cal. App. 4th 913, 130 (2003) (holding that the individuals were
 19 not matters of public interest because they had “received no public attention or media
 20 coverage”)).

21 Here, the Complaint alleges that the Reface app contains the images of
 22 “thousands of [] actors, musicians, athletes, celebrities, and other well-known
 23 individuals.” Compl. ¶¶ 1,13. The Complaint further alleges that Plaintiff himself is
 24 in the public eye. *See id.* ¶ 5 (“Plaintiff . . . is a cast member of several CBS shows.
 25 He was a finalist in season 23 of Big Brother and Starred in the Challenge: USA.”).
 26 Thus, by Plaintiff’s own admission, he is in the public eye and therefore of “public
 27 interest.” *See Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 677-78 (2010)
 28 (stating that “public interest which attaches to people who, by their accomplishments,

1 mode of living, professional standing or calling,” call the public’s attention to their
 2 activities); *Seeling v. Infinity Broad. Corp.*, 97 Cal. App. 4th 798, 808 (2002) (“By
 3 having chosen to participate as a contestant in [a reality tv show], plaintiff voluntarily
 4 subjected herself to [commentary] by the public.”). Indeed, users could only “wish
 5 to be” (Compl. ¶ 3) someone well-known and in the public eye. Accordingly,
 6 Plaintiff’s claim concerns an issue of public interest.

7 **2. Reface involves rights of free speech in connection with a**
 8 **public issue or an issue of public interest.**

9 Giving users a platform to create digital content and new visual works, as
 10 Reface does, furthers free speech. “An act is in furtherance of the right of free speech
 11 if the act helps to advance that right or assists in the exercise of that right.” *Tamkin*
 12 *v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143 (2011) (explaining that “acts [that]
 13 helped to advance or assist in the create[ing], casting, and broadcasting of an episode
 14 of a popular television show” qualified for protection under the anti-SLAPP statute).
 15 The Ninth Circuit has explained that visual works “always communicate some idea
 16 or concept to those who view [them], and as such are entitled to full First Amendment
 17 protection.” *White v. City of Sparks*, 500 F.3d 953, 955-56 (9th Cir. 2007).

18 Reface allows users to create new expressive works from a catalogue of photos
 19 and GIFs by using “an artificial intelligence algorithm to allow users to swap faces
 20 with actors, musicians, athletes, celebrities, and/or other well-known individuals” to
 21 “generate a new watermarked image or video.” Compl. ¶¶ 1-2, 19. The Complaint
 22 also recognizes that the newly generated images embody both the user’s creativity
 23 and aesthetic expression. *Id.* ¶¶ 4, 21. Like other visual content, the newly generated
 24 photos and videos are entitled to First Amendment protection, and Defendant’s
 25 operation of the application that enables the creation of this new content furthers
 26 users’ right to free speech.

27 In sum, Plaintiff’s claims arise out of Defendant’s First Amendment protected
 28 activity.

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B. Plaintiff Cannot Demonstrate a Probability of Prevailing on His Right of Publicity Claim.

Because Plaintiff’s claim arises out of protected activities, the burden shifts to him to show a probability of prevailing on his claim. *See Planned Parenthood*, 890 F.3d at 832-33 (*citing* Cal. Civ. Proc. Code § 425.16(b)(1)) (the second step of anti-SLAPP requires plaintiffs to show that the complaint is legally sufficient). Plaintiff cannot meet this burden for three independent reasons: (1) Plaintiff’s claim is preempted by the Copyright Act; (2) the First Amendment bars Plaintiff’s claim; and (3) Plaintiff fails to plead to a prima facie violation of his right of publicity.

1. The Copyright Act Preempts Plaintiff’s Claim.

“The Copyright Act affords copyright owners the ‘exclusive rights’ to display, perform, reproduce, or distribute copies of a copyrighted work, to authorize others to do those things, and to prepare derivative works based upon the copyrighted work.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (*citing* 17 U.S. C. § 106). Section 301 of the Copyright Act preempts state-law claims that “come within the subject matter of copyright” and assert rights that are “equivalent” to the exclusive rights provided to copyright owners under the Copyright Act. 17 U.S. C. § 301(a).

The Ninth Circuit applies a two-part test to determine whether the Copyright Act preempts a state-law claim. *Maloney*, 853 F.3d at 1010. First, the Court must determine whether the subject matter of the state-law claim falls within the subject matter of copyright as described in 17 U.S.C. §§102-103. *Id.* If the first requirement is met, the Court then considers “whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.” *Id.*

1 **a. The subject matter of Plaintiff’s right of publicity**
 2 **claim falls within the subject matter of copyright.**

3 Plaintiff’s claim is within the subject matter of copyright. The Copyright Act
 4 defines the “subject matter of copyright” to include “original works of authorship
 5 fixed in any tangible medium of expression . . . from which they can be perceived,
 6 reproduced, or otherwise communicated, either directly or with the aid of a machine
 7 or device.” 17 U.S.C. § 102(a). “Works of authorship” include “pictorial or graphic”
 8 works. *Id.* § 102(a)(5). In *Maloney*, under step one, the Ninth Circuit explained that
 9 state law right of publicity claims are preempted by the Copyright Act “when a
 10 likeness has been captured in a copyrighted artistic visual work and the work itself is
 11 being distributed for personal use.” *Id.* at 1011. But a right of publicity claim is not
 12 preempted when the claim concerns the use of one’s name or likeness in advertising
 13 or the sale of merchandise. *Id.*

14 The core of Plaintiff’s right of publicity claim is that Defendant used
 15 photographs and videos of him from the CBS television program, Big Brother, in the
 16 free version of its Reface app. *See* Compl. ¶ 2 (“[t]he free version grants the Free
 17 User access to the Reface library of movie and show clips and images.”); *id.* ¶ 22
 18 (explaining that the pre-set catalogue “contains images and videos often depicting
 19 individuals’ physical bodies in the role for which they are famous”); *id.* (“[i]n Mr.
 20 Young’s case, the Reface application allows users to swap their face on his body from
 21 scenes on CBS’s big brother). The photo stills, video clips, and the Big Brother
 22 program are clearly within the subject matter of copyright, and Plaintiff has not
 23 alleged that he is the copyright holder. Indeed, CBS, as the exclusive licensee of the
 24 Big Brother program, has previously sued another network for allegedly infringing
 25 copyrights in Big Brother. *See, e.g., CBS Broad. Inc. v. Am. Broad. Cos., et al.*, C.D.
 26 Cal. Case No. 12-CV-04073-GAF-JEMx, Complaint (Dkt. 1) at ¶¶ 74-81.¹ The use

27 ¹ When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a district court
 28 properly considers facts for which judicial notice may be taken. *See Van Buskirk v.*
Cable News Network, Inc., 284 F.2d 977, 908 (9th Cir. 2002). Federal Rules of

1 of photographs of Plaintiff falls within the subject matter of copyright. *See Maloney*,
2 853 F.3d at 1011.

3 **b. Plaintiff asserts rights that are equivalent to rights**
4 **within the general scope of copyright.**

5 Plaintiff's right of publicity claim asserts rights that are equivalent to those
6 protected by copyright law. Section 106 of the Copyright Act affords copyright
7 owners "exclusive rights" to display, perform, reproduce, distribute or create
8 derivative copies of their copyrighted works. 17 U.S.C. § 106. To survive
9 preemption, the asserted state-law right must protect rights that are "qualitatively
10 different from" the rights protected by copyright law. *Laws v. Sony Music Ent., Inc.*,
11 448 F.3d 1134 (9th Cir. 2006) (citation omitted). For that reason, non-preempted
12 claims must have an "extra element" that is sufficient to "transform the nature of the
13 action." *Id.* at 1144. "But where a likeness has been captured in a copyrighted artistic
14 visual work and the work itself is being distributed for personal use, a publicity right
15 claim is little more than a thinly disguised copyright claim" that is preempted.
16 *Maloney*, 853 F.3d at 1016.

17 Here, Plaintiff does not identify any use of his name, voice, photograph, or
18 likeness independent of Defendant's use of the copyrighted photos or videos in which
19 Plaintiff is depicted. Rather, Plaintiff claims that Defendant violated his statutory
20 right of publicity by displaying the photographs in which he appears (Compl. ¶¶ 18,
21 22); displaying those photographs in its online "Pre-sets" database of photographs
22 (*id.* ¶¶ 24, 39); allowing end users to "generate [] a new watermarked image or video
23 where the individual depicted in the Pre-sets catalogue has his or her face swapped"

24

Evidence 201(b) authorizes courts to take judicial notice of facts that are "not subject
25 to reasonable dispute" and "can be accurately and readily determined from sources
26 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The
27 existence of CBS's assertion of an exclusive license in Big Brother in a copyright
28 infringement case is "not subject to reasonable dispute" because it is both generally
known within the jurisdiction and can be accurately and readily determined from
sources whose accuracy cannot reasonably be questioned, as it is available on this
Court's ECF system.

1 with the face that was uploaded by the free user (*id.* ¶19); which “commercially
2 exploit [Plaintiff] and other class members’ identities to promote paid subscriptions
3 to the Reface application,” (*id.* ¶ 21). Thus, Plaintiff’s claim presumes that Reface
4 displays an expressive work—his photo or clips from Big Brother—and allows users
5 to create and distribute derivative works from that work without his permission, both
6 of which are exclusive rights under the copyright law. Plaintiff’s claim alleges
7 nothing more and, therefore, lacks the “extra element” required by law and thus is
8 qualitatively no different from a copyright claim. *See Laws*, 448 F.3d at 1144 (“[t]he
9 mere presence of an additional element (‘commercial use’) in section 3344 is not
10 enough to qualitatively distinguish [a] right of publicity claim from a claim in
11 copyright.”). Therefore, Defendant’s use of Plaintiff’s image is entirely subsumed
12 by the rights protected by copyright law and granted to copyright holders, which
13 Plaintiff is not. *Id.*; *Maloney*, 853 F.3d at 1019.

14 Plaintiff’s claim here does not differ materially from the claim in *Maloney*,
15 which the Ninth Circuit held was preempted by Copyright Act. In *Maloney*, college
16 athletes sued the operator of a website that displayed and sold photos of plaintiffs and
17 other athletes that defendant had licensed from the NCAA. *Id.* at 1011-12. The Ninth
18 Circuit rejected plaintiffs’ argument that because defendant made a commercial use
19 of their images, their right of publicity claim survived preemption. *Id.* at 1138-40.
20 Because the defendant simply displayed copyrighted photos and sold those photos,
21 the publicity claims overlapped completely with the rights of the copyright owner.
22 *Id.* Plaintiff’s claim here is the same. The essence of his claim is that Reface displays
23 photos or video clips of him from CBS shows, and which users can view, make
24 derivative works of and then distribute. Those rights are no different from those
25 reserved by copyright owners and, therefore Plaintiff’s right of publicity claim is
26 preempted.

27 Plaintiff will likely argue that Defendant’s addition of a watermark to the
28 photos and videos users create when using the free version of Reface transform the

1 photos into “teaser” advertisements, which use is not preempted. But the “teaser”
 2 terminology is a misnomer invented by the Plaintiff. Reface’s free version is a fully
 3 functional version of the app that is not a time or usage limited promotion, like a true
 4 teaser. Like many software products with different feature levels, the PRO version
 5 offers features that are not available in the free version. The fact that the PRO and
 6 free versions have different feature sets does not make the free version an
 7 advertisement for the PRO version.

8 The free version is no different from the PRO version in its core feature. Both
 9 allow users to access photos and video clips from the “Pre-Sets” libraries. Both allow
 10 users to create derivative works from those source materials. The Complaint makes
 11 clear that Plaintiff’s right of publicity claims arise out of the display and ability of
 12 free Reface users to modify photos and video clips of TV shows in which Plaintiff
 13 appeared. *See* Compl. ¶ 22 (“[t]he free version grants the Free User access to the
 14 Reface library of movie and show clips and images.”); *id.* ¶ 22 (describing how
 15 NeoCortex’s pre-sets catalogue “contains images and videos often depicting
 16 individuals’ physical bodies in the role for which they are famous”); *id.* (“In Mr.
 17 Young’s case, the Reface applications allows users to swap their face on his body
 18 from scenes on CBS’s big brother.”). While the Complaint incants the words
 19 “advertising” and “commercial,” the conduct that forms the basis of his complaint is
 20 equivalent to copyright rights. Plaintiff nowhere alleges that Defendant uses his face
 21 on merchandise that it sells or in advertisements that it uses to promote its products.

22 At most, the Complaint alleges Defendant automatically imposes a digital
 23 watermark on the *modified* photos or GIFs that do *not* contain his image that free
 24 version users create. But simply placing a watermark on an item is not advertising.
 25 Where courts have found a use of an image or likeness to be for an advertising or
 26 commercial purpose that avoids copyright preemption, the defendant used the image
 27 or likeness in advertising that was separate from the copyrighted work itself. *See*
 28 *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1000 (9th Cir. 2001). In *Downing*

1 the Ninth Circuit held that the Copyright Act did not preempt Plaintiff’s right of
2 publicity claim against a clothing retailer that used Plaintiff’s name and photos of
3 him in its catalogue which was the company’s “largest advertising vehicle.” *Id.* at
4 999, 1000. The defendant also created t-shirts, exactly like those worn by the plaintiff
5 in the photographs and advertised them for sale in the catalogue. *Id.* The Court held
6 that the use of Plaintiff’s name and likeness in its primary advertising channel was
7 not preempted. *Id.* at 1005.

8 In *Maloney*, the Ninth Circuit clarified that “*Downing* did not mint a
9 categorical rule that publicity-right claims ‘relating to a likeness in a photograph’ are
10 not subject to preemption.” *Maloney*, 853 F.3d at 1012. Rather, the preemption
11 analysis turns on how the likeness is used. *Id.* In *Maloney*, as here, the plaintiff’s
12 right of publicity claims were based on the alleged display, distribution, and sale of
13 the copyrighted work itself in which the plaintiff’s image appeared. *Id.* The alleged
14 commercial use was simply the display and sale of the copyrighted work—both of
15 which were rights exclusively granted under copyright, and the *Maloney* plaintiff’s
16 claim was thus, which was preempted. In *Downing*, on the other hand, the defendant
17 used photos of a famous surfer to in advertisements for its surf-themed apparel.
18 Because the defendant was not selling the photos of the Plaintiff, but was using his
19 persona to advertise clothes—something separate from the original works—the use
20 was commercial and advertising. The claim therefore had an additional element and
21 was not subsumed into copyright. *Id.* at 1013 (quotations omitted).

22 Unlike *Downing*, here, Defendant simply places its watermark on the user’s
23 newly generated photos as a way to distinguish the new work from the original work.
24 Defendant does not, nor does the Complaint allege, sell products depicting
25 photographs of Plaintiff. Indeed, watermarks serve as a common way to limit the
26 utility of an object, not further it. For example, Getty Images uses a watermark on
27 all of its photos, but that use does not operate as an advertisement. Common sense
28 dictates that the watermark is used to convey limits on use of the image so that it

1 won't be used commercially. See *Creative Photographers, Inc. v. Brook Collection,*
 2 *LLC*, No. 2:20-cv-09261-RGK-E, 2021 WL 3568243, at * 1 (C.D. Cal July 7, 2021)
 3 (“Plaintiff placed a watermark on the center of the image, thereby protecting it with
 4 copyright management information.”); *Playboy Enters., Inc. v. Terri Welles, Inc.*, 78
 5 F.Supp.2d 1066, 1087-88 (S.D. Cal. 1999) (explaining the court’s “befuddlement at
 6 the oxymoronic meaning” that a watermark, which “is usually located in the
 7 background and not the foreground of a page” could be so prominent as to constitute
 8 a commercial theme), *reversed on other grounds*, 279 F.3d 796, 804 (9th Cir. 2002)).

9 **2. Plaintiff’s Right of Publicity Claim is Also Barred by the**
 10 **First Amendment.**

11 Plaintiff cannot prevail on his right of publicity claim for the independent
 12 reason that the claim violates the expressive rights of Defendant and its users that are
 13 guaranteed by the First Amendment. The California Supreme Court has observed that
 14 the “right of publicity threatens two purposes of the First Amendment: (1) preserving
 15 an uninhibited marketplace of ideas; and (2) furthering the individual right of self-
 16 expression.” *Winter v. DC Comics*, 30 Cal. 4th 881, 887 (2003). “[B]ecause celebrities
 17 take on personal meanings to many individuals in the society, the creative
 18 appropriation of celebrity images can be an important avenue of individual
 19 expression.” *Id.* (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25
 20 Cal.4th 387, 397 (2001)).

21 To balance celebrities’ rights of publicity with the First Amendment’s
 22 protections, California law applies the “transformative use” test, which asks “whether
 23 the work in question adds significant creative elements so as to be transformed into
 24 something more than a mere celebrity likeness or imitation.” *Winter*, 30 Cal. 4th at
 25 885 (2003) (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th
 26 387, 391 (2001)). “If distinctions exist, the First Amendment bars claims based on
 27 appropriation of the plaintiff’s identity or likeness; if not, the claims are not barred.”
 28 *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 61 (2006). As part of this inquiry,

1 courts look to whether the defendant merely used the plaintiff’s likeness as “one of
2 the ‘raw materials’” from which a new, creative work is “synthesized” and is
3 therefore protected expression. *Id.* at 57-58. In *Winter*, for example, the California
4 Supreme Court found that depictions of the plaintiff musicians in a comic book series
5 as cartoony, worm-like characters were transformative because they contained
6 “expressive content other than plaintiffs’ mere likenesses.” *Winter*, 30 Cal. 4th at
7 890. In *Kirby*, the Court of Appeal similarly found that a video game character which
8 bore similarities to plaintiff (another singer), was transformative because the
9 character was a fanciful, Japanese anime style news reporter from outer space. *Kirby*,
10 144 Cal. App. 4th 59-61.

11 Here, as in *Winter* and *Kirby*, the Complaint language itself establishes that
12 Defendant’s use in the Reface app of photos and GIFs containing Plaintiff’s image is
13 distinct and thus transformative. First, the First Amendment unambiguously protects
14 using software like Reface to create new visual works, especially where the new
15 image “communicate[s] some idea or concept” through a visual medium. *See White*,
16 500 F.3d at 956 (9th Cir. 2007) (explaining that “arts and entertainment constitute
17 protected forms of expression under the First Amendment”). The very purpose of
18 Reface is to transform a photo or video in which Plaintiff’s (or others) image appears
19 into a new work in which Plaintiff’s face does *not* appear. Display of the original
20 work is a necessary pre-cursor to this transformative process. The Complaint
21 acknowledges this transformative purpose, alleging that the app “uses an artificial
22 intelligence algorithm to allow users to swap faces with actors, musicians, athletes,
23 celebrities, and/or other well-known individuals.” Compl. ¶ 1. The Complaint
24 further alleges that the newly generated photos or videos have “aesthetic value.” *Id.*
25 ¶ 21. Moreover, Reface users use the newly created images for in “creative ways”
26 like humor and surprise. *Id.* ¶ 4. As *Winter* found, transformed depictions of a
27 celebrity “are no less protected because they provide humorous rather than serious
28

1 commentary.” *Winter*, 30 Cal. 4th at 890. Accordingly, the distinctions between the
2 original photos of Plaintiff and the Reface app’s output makes the use transformative.

3 **3. Plaintiff Fails to Plead a Prima Facie Violation of His Right**
4 **of Publicity.**

5 Plaintiff fails to allege a prima facie violation of his publicity rights. Under
6 California law, to establish a claim for violation of the statutory right of publicity,
7 Plaintiff must allege that Defendant “knowingly uses [his] name, voice, signature,
8 photograph, or likeness” for advertising purposes. Cal. Civ. Code § 3344(a).
9 Plaintiff has not sufficiently alleged that Defendant “knowingly” used his, or anyone
10 else’s, name, voice, photograph, or likeness for advertising purposes. Rather,
11 Plaintiff merely alleges that Defendant created a “library of movie and show clips
12 and images (‘Pre-sets catalogue’)” compiled from online sources such as
13 “mybestgif.com, <https://tenor.com/>, Google Video, and Bing Video.” Compl. ¶¶ 2,
14 15. Reface users could then use photos and GIFs from that catalogue as they wished,
15 and at no charge for the free version. Nothing in the Complaint indicates that
16 Defendant knew Plaintiff’s photos and GIFs containing Plaintiff’s face were included
17 in the database. The Complaint fails to even mention the words “knowingly,”
18 “knew,” or any variation of the words outside of listing the legal standard for pleading
19 a violation of the statutory right of publicity. Thus, rather than plead the necessary
20 facts, Plaintiff simply recites the elements of the statute. This is not enough to state
21 a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (mere legal
22 conclusions or recitation of elements of a claim, even if dressed as factual allegations,
23 cannot state a claim).

24 In the same vein, Plaintiff fails to sufficiently plead that Defendant uses his
25 name in the Reface app. The Complaint lacks factual averments regarding the use of
26 Plaintiff’s name. Plaintiff does not attempt to explain how his name was used in the
27 Reface app. Nor does he allege any basis to allow the Court to deduce that one’s
28 name would be used, or necessary, for an application based merely on photographs.

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1 While the Complaint alleges that “[s]everal animated images of Mr. Young can be
2 found using the Reface application’s search bar,” Compl. ¶ 18, the Complaint does
3 not allege that users can search for Plaintiff by name, or whether video clips in which
4 he appears are returned by a search for “Big Brother.” Even if users could search for
5 Plaintiff by name, the Complaint fails to allege that the search is of data maintained
6 by Plaintiff instead of the third party sources of photos and video clips like Tenor and
7 Google video. *See* Compl. ¶ 15.

8 Finally, as explained above, *supra* section IV.B.1.b, the Complaint does not
9 sufficiently allege that the NeoCortext’s use constitutes advertising.

10 **V. CONCLUSION**

11 For all these reasons, Defendant NeoCortext respectfully requests that the
12 Court grant its anti-SLAPP motion under Cal. Civ. Proc. Code § 425.16, strike
13 Plaintiff’s right of publicity claim, and award NeoCortext its fees and costs under
14 Cal. Civ. Proc. Code § 425.16(c).

15
16 Dated: May 31, 2023

FENWICK & WEST LLP

17 By: /s/Tyler G. Newby
18 Tyler G. Newby

19 Attorneys for Defendant
20 NEOCORTEXT, INC.

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff NeoCortext, Inc., certifies that this brief contains 5,624 words, which complies with the word limited of L.R. 11-6.1.

Dated: May 31, 2023

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